(2)

No. 97-954

In The

Supreme Court of the United States

October Term, 1997

JANICE E. HETZEL,

Petitioner,

vs.

COUNTY OF PRINCE WILLIAM and CHARLIE T. DEANE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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68 pp

QUESTION PRESENTED FOR REVIEW

When a Court of Appeals mandate becomes final and operative, after an appeal to this Court, does that Court of Appeals have the right to enforce its mandate by issuing a writ of mandamus to a trial court which has disobeyed it?

LIST OF PARTIES TO THIS PROCEEDING

The petitioner, Janice E. Hetzel, was the plaintiff below and appellee in the Court of Appeals, Respondents County of Prince William (Virginia) and Charlie T. Deane were defendants below and appellants in the Court of Appeals. G.W. Jones and C.E. O'Shields were defendants in the trial court, but were not parties to the appeal and are not respondents in this Court.

TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Statutes Cited:

Contents

Contents

Respondents ask the Court to deny this Petition for a Writ of Certiorari, which at bottom does no more than raise an issue which was or should have been raised in the prior Petition denied in this case (Record No. 96-574). Further, the United States Court of Appeals for the Fourth Circuit clearly had jurisdiction to enforce, through a writ of mandamus to the district court, the mandate of *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 584, 136 L. Ed. 2d 514 (1996), after this Court denied certiorari from that decision. Officer Hetzel's argument to the contrary has no merit.

OPINIONS BELOW

This Petition purportedly seeks review of an unreported decision of the Fourth Circuit Court of Appeals on September 12, 1997, issuing a writ of mandamus to the United States District Court for the Eastern District of Virginia, Alexandria Division. The writ was issued to stay the new trial improvidently ordered by the district court in another unreported decision on June 23, 1997. The district court's June, 1997, order vacated an earlier order, again unreported, of December 20, 1996. All three orders are attached to the Petition, as Appendices D, A, and B, respectively. For the Court's convenience, citations to these opinions will be to the Appendix of the Petition.

The substantive issues raised in this Petition challenge the Fourth Circuit decision which the writ of mandamus was merely issued to reiterate, *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 584, 136 L. Ed. 2d 514.

Finally, the writ of mandamus referred the district court to the mandate of *Hetzel* ordering it to recalculate damages. On December 23, 1997, the district court did in fact enter a judgment of damages amounting to $15,000. A copy of that order is attached as Appendix A to this Opposition.

STATEMENT OF JURISDICTION

To the extent that this Petition, on its face, is a challenge to the issuance of a writ of mandamus by the Fourth Circuit, this Court has jurisdiction for the reasons set forth in the Petition's Statement of the Basis for Jurisdiction.[1] To the extent that the September 12, 1997, order of the Fourth Circuit is a final order, this Court would also have jurisdiction over a challenge to that order under 28 U.S.C. § 1254(1).

However, for the reasons set forth below, this Petition is actually a challenge to a decision rendered by the Fourth Circuit Court of Appeals on July 11, 1996, which has already been subject to review by this Court. Therefore, pursuant to the provisions of 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of this Court, this Petition is filed too late. Further, this Petition raises issues which were, or should have been, raised in Officer Hetzel's first Petition from the July, 1996, decision. She may not raise them again here.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are set forth verbatim in the Appendix. They are the Seventh Amendment to the Constitution of the United States, 28 U.S.C. § 1651 and 28 U.S.C. § 2106.

1. It does not appear, however, that the Petition complies with the requirement of Rule 11 of this Court's Rules that a "showing [be made] that the case is of such imperative public importance as to justify deviation from normal appellate practice to require immediate determination in this Court." However, although the Fourth Circuit's September 12, 1997, order of mandamus suggests a possibility that the Court will enter some further order, it disposes of all matters that were before the Fourth Circuit. Respondents are willing to assume, then, for purposes of this Petition, that the September 12, 1997, order is a final order.

STATEMENT OF THE CASE

Officer Hetzel has pressed the central claims of her Petition upon this Court before. (*Hetzel v. County of Prince William*, Record No. 96-574). With the exception of the district court's June, 1997, order granting a new trial and the Fourth Circuit's issuance of a writ of mandamus, which does no more than repeat the language of the opinion Officer Hetzel challenged in her first Petition for Writ of Certiorari, the facts and procedural posture of this case have not changed.

A. The Underlying Litigation

As this Court may recall, Officer Hetzel brought a civil rights and Title VII action against the Board of County Supervisors of Prince William County, Police Chief Deane, and two of her then-superior officers, in July of 1994.[2] The central claims of that case were unfounded allegations of gender and national origin discrimination and harassment.[3] Officer Hetzel claimed a total of $9.3 million in damages, requested an immediate promotion with an award of back pay and front pay, and sought an injunction against the Police Department. The jury found no discrimination or harassment and ruled for the County and Chief Deane on seven out of ten counts. However, it found against them on three counts of retaliation, awarding $750,000 in emotional distress damages.

2. These officers were completely absolved of any liability to Officer Hetzel by the jury.

3. In accordance with the provisions of Rule 15(2) of the Rules of this Court, respondents must point out that the assertion on Page 2 of Officer Hetzel's Petition that she "was, and remains, the only female Hispanic police officer in the Prince William County Police Department" is untrue. While she was the only female Hispanic police officer listed on the certified eligibility list for promotion to sergeant, she is far from having been the only Hispanic police officer in the Department, and she is *not* the only female Hispanic officer.

The County and Chief Deane sought judgment in their favor as a matter of law. In the alternative, they requested a new trial, which Officer Hetzel vigorously opposed on the grounds that the record was complete, free of error, and sufficient to support the verdict. The district court agreed, and denied the County's and Chief Deane's Rule 59 motion. The trial court granted a portion of their Rule 50 motion, directing a verdict in their favor on one count of retaliation under, and reducing the jury's award to $500,000.

B. The Appeal and the Fourth Circuit's Decision

Respondents appealed the district court's decision. The Fourth Circuit, in a unanimous panel decision, determined that the verdict of $500,000, which was based almost entirely on Officer Hetzel's vague, conclusory and self-serving testimony, was outrageous and amounted to a gross miscarriage of justice.

The Fourth Circuit analyzed the record and ruled as a matter of law that almost all of the evidence the trial court said supported an award of $500,000 in emotional distress damages was legally incompetent for that purpose, and that the trial court had failed to give due consideration to other evidence in the record that Officer Hetzel really had no substantial damages. The Fourth Circuit went on to find that, on the record in this case, any amount of damages out of line with damage awards in two other, similar reported cases would be excessive as a matter of law.[4] It, therefore, reversed and remanded the case to the

4. *Bradley v. Carydale Enter.*, 730 F. Supp. 706, 726-27 (E.D. Va. 1989) (plaintiff received $9,000 for emotional distress damages caused when her landlord used racial epithets against her and tried to evict her in retaliation for her complaints of discrimination) and *McClam v. City of Norfolk Police Dep't.*, 877 F. Supp. 277, 284 (E.D. Va. 1995) (police detective received $15,000 in emotional distress damages on his claims of retaliation for complaints of discrimination).

district court for recalculation of damages using the guidelines set forth in the panel opinion. *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 584, 136 L. Ed. 2d 514, July 11, 1996.

C. Officer Hetzel's First Petition for a Writ of Certiorari

Officer Hetzel did not seek an *en banc* rehearing before the Court of Appeals, petitioning this Court for a writ of certiorari instead (Record No. 96-574). She argued in that Petition that the Fourth Circuit, in establishing the legal limit of damages available to her on the trial record, had exceeded its jurisdiction under the Seventh Amendment to the United States Constitution.

This Court denied Officer Hetzel's first Petition without comment on December 9, 1996.

D. Proceedings Giving Rise to this Writ

With the Fourth Circuit's decision made final and operative by the denial of a writ of certiorari, on December 9, 1996, this case returned to the district court for further proceedings. On December 16, 1996, Officer Hetzel filed a request for a new trial, based on her view that her post-appeal position was indistinguishable from that of a plaintiff being offered remittitur of a jury award by a trial court. Her motion indicated that she intended to reject *any* recalculated amount of damages lower than $500,000, and she, therefore, demanded a new trial. The County and Chief Deane opposed this motion, arguing that granting a new trial would disobey the Fourth Circuit's mandate.

On December 20, 1996, the trial court entered an order awarding Officer Hetzel $50,000, which the trial court again said during the hearing was based on evidence already

specifically disapproved by the Court of Appeals.[5] (A copy of the transcript of the December 20, 1996, hearing is attached as Appendix B to this Opposition, *see also* Petition, Appendix B). The order also directed Officer Hetzel to file a motion for a new trial if she decided not to accept this award. The trial court told the parties during the December 20, 1996, hearing that it would deny such a motion because it did not believe it had jurisdiction under the Fourth Circuit's mandate to order a new trial. Pursuant to the trial court's order, Officer Hetzel filed another motion for a new trial, to which the County and Chief Deane filed yet another opposition.

Believing that the trial court would immediately issue an order denying the new trial motion, as it said it would, the County and Chief Deane noted an appeal from the December 20, 1996, order entering judgment, on the grounds that an award of $50,000 in damages, based on the reasons stated by the trial court which had already been disapproved by the Fourth Circuit, disobeyed the July, 1996, Fourth Circuit mandate. When the trial court's decision on the new trial motion was not forthcoming, the appeal was stayed.

After a lapse of some six months, the trial court suddenly issued an order on June 24, 1997, vacating the December 20, 1996, order and granting Officer Hetzel a new trial. (*See* Petition, Appendix A). In that order, the trial court provided Officer Hetzel

5. The trial court again stated that one of the two primary reasons justifying a large award of damages was that fact that Officer Hetzel cried at counsel table during most of the trial. The trial court also stated that the other primary reason supporting a large award was the fact that some of Officer Hetzel's coworkers knew that she had cried after being interviewed by Internal Affairs. The judge took judicial notice that Officer Hetzel *must*, therefore, have been diminished in their eyes, despite the direct testimony of those coworkers at trial that the knowledge that Officer Hetzel had cried did not lower their opinion of her. (*See* Appendix B to this Opposition, 11a-14a).

the opportunity to take additional discovery, presumably so that she would be in a better position to produce some competent evidence of significant emotional distress damages at re-trial.[6] The County and Chief Deane immediately petitioned the Fourth Circuit for a writ of mandamus and, in the alternative, amended their previously-filed notice of appeal.

The Fourth Circuit granted the petition and issued a writ of mandamus to the district court on September 12, 1997. (*See* Petition, Appendix D). The mandamus referred the district court to the earlier mandate, ordered it to recalculate damages and attorney's fees, and reminded it of the earlier direction to

> closely examine the awards in *Bradley v. Carydale Enter.*, 730 F. Supp. 709, 726-27 (E.D. Va. 1989) and *McClam v. City of Norfolk Police Dep't.*, 877 F.Supp. 277, 284 (E.D. Va. 1995), which we believe are comparable to what would be an appropriate award in this case.

(Quoting *Hetzel v. County of Prince William*, 89 F.3d 169, 173 (4th Cir. 1996)) (Petition, Appendix D at 25a).[7]

6. Officer Hetzel was given an incredible amount of discovery before the first trial. The Respondents turned over more that 750,000 documents. In return, Respondents asked that she describe her emotional distress damages in discovery, and this is the evidence that was admitted at trial. Testimony in the first trial went on for eight days. If she was unable to prove any thing more than the "pittance" in emotional damages the Fourth Circuit found she was entitled to under these circumstances, it is absolutely inconceivable what better proof she would be able to produce in a second trial.

7. Following this direction, the district court entered judgment on December 23, 1997, awarding Officer Hetzel $15,000 in compensatory damages for emotional distress. (*See* Appendix A to this Opposition).

Officer Hetzel then filed this second Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

This second Petition for a Writ of Certiorari is a transparent attempt to get a another bite at the apple before this Court on the very issue this Court put to rest in denying Officer Hetzel's first Petition.

Over a year ago, Respondents were before this Court on Officer Hetzel's challenge to the Fourth Circuit's July 11, 1996, mandate as inappropriate and beyond that court's jurisdiction under the Seventh Amendment. This Court denied the writ by Order entered December 9, 1997. Today, Officer Hetzel tries to sneak that same challenge into this Court again by disguising it as a complaint about the Fourth Circuit's use of its power of mandamus. Her *real* complaint is still with the Fourth Circuit's July 11, 1996 mandate. [8]

8. Any doubt about her intentions is dispelled by the reasons she says this Court should grant certiorari. In the Petition's "Reasons for Granting the Writ," she claims that this Court must intervene to protect the right to trial by jury in the Fourth Circuit. It bears repeating that, in this case, it was the July 11, 1996, decision which ordered recalculation of damages without referring the matter to a new jury, not the writ of mandamus.

She suggests further in her "Reasons for Granting the Writ" that the Fourth Circuit Court of Appeals is running amok and substituting its factual determinations of damages for jury determinations in cases where plaintiffs have prevailed on the liability issue. In support of this bold suggestion she mischaracterizes the Fourth Circuit's decision in two recent cases. She alleges that in those cases, "the Fourth Circuit also rejected the properly-instructed juries' assessment of damages and liability in employment related civil rights cases."

(Cont'd)

In order to obtain the relief she seeks, which is to be relieved of the legal constraints placed on her recovery of damages by the Fourth Circuit, Officer Hetzel must convince this Court to rewrite the Fourth Circuit's 1996 decision. Her Petition should be denied.

I.

THE FOURTH CIRCUIT'S ISSUANCE OF A WRIT OF MANDAMUS TO ENFORCE ITS JULY 11, 1996, DECISION WAS APPROPRIATE.

The Petition, taken at no more than face value, challenges the Fourth Circuit's right to issue a writ of mandamus to enforce its earlier mandate in this case. The Fourth Circuit clearly had that right, and the Petition should be denied for this reason alone.

As a general matter, the Courts of Appeals are authorized to issue writs of mandamus in appropriate cases by the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of

(Cont'd)

In *Grier v. Titan Corp.*, 121 F.3d 698 (4th Cir. 1997) (Table Case) (a copy is attached as Appendix 29a to this Opposition), the Fourth Circuit did no more than affirm a trial court's decision to set a jury verdict aside. In *Gill v. System Planning Corp.*, 121 F.3d 698 (4th Cir. 1997) (Table Case) (a copy is attached as Appendix 34a to this Opposition) the Fourth Circuit determined, as a matter of law, that the plaintiff failed to demonstrate required elements entitling her to a liability verdict. Of course, the jury verdict in that case had to be set aside under those circumstances.

Any suggestion that the Fourth Circuit imposed its naked factual judgment as to the award the plaintiffs should receive in these cases, or any suggestion that these cases show that the Fourth Circuit is either ignorant of or unimpressed by the Seventh Amendment is simply dishonest.

Appellate Procedure. The question is, then, whether this was such an "appropriate case."

Although Officer Hetzel will barely acknowledge the fact in her Petition, the Fourth Circuit did *not* remand this case to the district court generally. Rather, it provided an affirmative mandate, in the form of direct instructions to recalculate damages:

> Here, the award of $500,000 was grossly excessive when compared to the limited evidence of harm presented at trial and would result in a "serious miscarriage of justice" if upheld. Accordingly, we set aside the damage award and remand the case to the district court for recalculation of the award of damages for emotional distress. Upon remand, the district [court] should closely examine the awards in *Bradley v. Carydale Enter.*, 730 F.Supp. 709, 726-27 (E.D.Va. 1989) [award of $9,000], and *McClam v. City of Norfolk Police Dep't*, 877 F.Supp. 277, 284 (E.D.Va. 1995) [award of $15,000] which we believe are comparable to what would be an appropriate award in this case.

Hetzel, 89 F.3d at 173 (non-relevant footnote omitted). In entering an award of $50,000 and granting Officer Hetzel a new trial when she rejected that amount, the district court clearly disobeyed these instructions.

This Court has ruled on several occasions that, when a lower court appears to have disobeyed or misconstrued a higher court's determination of a given case, the appropriate remedy is a petition for a writ of mandamus or prohibition to the higher court. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424, 98 S. Ct. 702, 54 L. Ed. 2d 659 (1978); *In re Potts*, 166 U.S. 263, 17 S.

Ct. 520, 41 L. Ed. 994 (1897) (overruled on other grounds: *Standard Oil Co. v. United States*, 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976)); *Perkins v. Fourniquet*, 55 U.S. 328, 14 L. Ed. 441 (1853).

In *Vendo Co.* this Court held, with respect to its own power of mandamus, and the procedure that should be followed when a lower court misconstrues an appellate court's mandate:

> We believe that the parties are correct in treating this as an action for mandamus, which is available to a party who has prevailed in this Court if the lower court "does not proceed to execute the mandate, or disobeys or mistakes its meaning . . ." *United States v. Fossatt*, 21 How. 445, 446, 16 L. Ed. 185 (1859). Put another way,
>
> > [w]hen a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. *The Circuit Court is bound* by the decree as the law of the case; and must carry it into execution, according to the mandate . . . If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action *may be controlled*, either upon a new appeal (if involving a sufficient amount) or *by a writ* of mandamus to execute the mandate of this *court*.
>
> *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S. Ct. 291, 40 L. Ed. 414 (1895).

434 U.S. at 427-428, 98 S. Ct. at 703-704, 54 L. Ed. 2d at 662, (emphasis supplied).

This Court's decisions in *Vendo Co.* and *Sanford Fork & Tool Co.*, bear directly on the question of whether the power to issue the writ of mandamus was appropriately invoked in this case. They establish the Fourth Circuit's clear jurisdiction in this regard, and remove any doubt that the Fourth Circuit could issue the writ in this case when it found that the lower court had not executed its July 11, 1996, mandate.

In contrast, the cases Officer Hetzel cites in her Petition, including *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980), deal only with the question of whether mandamus can be issued when a trial court sets aside a verdict and orders a new trial itself. Those cases do not involve appellate mandates, or disobedience of those mandates. Those cases simply do not apply.

II.

OFFICER HETZEL CANNOT CHALLENGE THE FOURTH CIRCUIT'S ENFORCEMENT OF ITS JULY 11, 1996 MANDATE.

Because the Fourth Circuit clearly had jurisdiction to issue the writ of mandamus, the only real question raised by Officer Hetzel's Petition is whether the mandate itself, that the district court recalculate damages without offering Officer Hetzel a new trial, is appropriate. Even if this Court had jurisdiction to entertain this question, it should not do so.

First, the mandate itself comes from the July 11, 1996, Fourth Circuit opinion. It did not originate in September 12, 1997, writ of mandamus, which reiterates the operative language of the 1996 opinion. (*See* Petition, Appendix D at 24a-25a). Had the July 11, 1996, mandate not become final and operative upon this Court's denial of Officer Hetzel's first Petition for Writ of

Certiorari, it is far too late now, some eighteen months after the fact, to seek review of that mandate. The fact that the Fourth Circuit was required, due to the district court's disobedience of its mandate, to engage in further proceedings to enforce its decision, does not extend the time within which Officer Hetzel was required to challenge the decision itself. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 43 S. Ct. 458, 67 L. Ed. 719 (1923).

Further, Officer Hetzel had the opportunity to challenge the mandate in her first Petition, and, indeed, she did urge this Court to reverse the Fourth Circuit on Seventh Amendment grounds. To the extent that her current argument was not subsumed in her first argument, she waived it in any event by not specifically raising it.

Second, even if this Court had jurisdiction to entertain, at this late date, a challenge to the Fourth Circuit's July 11, 1996, action, Officer Hetzel's argument that the mandate violates the Seventh Amendment is simply wrong.

A Court of Appeals can, consistent with the Seventh Amendment, instruct a lower court to recalculate damages without ordering a new trial. According to 28 U.S.C. § 2601:

> The Supreme Court or any other court of appellate jurisdiction may affirm, *modify*, vacate, set aside, or reverse *any judgment*, decree, or order of a court lawfully brought before it for review, and may remand the cause *and direct the entry of such appropriate judgment*, decree, or order, *or require such further proceedings to be had as may be just under the circumstances.*

(Emphasis supplied).

Against this clear language, Officer Hetzel claims that the Seventh Amendment entitles her to a second trial, *for no other reason* than because the record of the first trial will not, as a matter of law, support the dollar amount of damages she wants. She relies on the holding in *Kennon v. Gilmer*, 131 U.S. 22, 9 S. Ct. 696, 33 L. Ed. 110 (1889), for this proposition. Her reliance is misplaced.

In *Kennon*, an appellate court held that an entire trial record was tainted with passion and prejudice against the defendants, yet went on to use that very record to arrive at a specific dollar judgment against those same defendants. The Supreme Court reversed, remarking that this action was, at that time, unprecedented, as Officer Hetzel notes on pages 6-7 of her Petition. However, Officer Hetzel does not refer to the flaw this Court found in the appellate court's reasoning which required the reversal. The appellate court held that the record in that case supported *both* the conclusion that the trial was unfair to defendants *and* a significant award of damages should still be made against those same Defendants. This Court found that reasoning illogical and sent the case back for a new trial. *Kennon*, 131 U.S. at 28, 9 S. Ct. at 698, 40 L. Ed. at 113.

This Court did not hold in *Kennon*, as Officer Hetzel would have us believe, that Courts of Appeals are prohibited by the Seventh Amendment from issuing mandates preventing the retrial of thoroughly and, at least as far as Officer Hetzel asserted post-trial and on appeal, fairly tried facts.

Further, this Court has more fully and more recently elaborated its views on whether Courts of Appeals can issue mandates which dispose of factual issues on appeal. In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967), *reh. denied*, 386 U.S. 1027, 87 S. Ct. 1366, 18 L. Ed. 2d 471 (1967), the Supreme Court rejected a

Seventh Amendment challenge to a Court of Appeals' decision to remand a case to the trial court for entry of judgment for the defendant. While the analogy between an appellate court's right to grant judgment n.o.v. (which was at issue in *Neely*) and an appellate court's right to order a trial court to recalculate damages based on the existing record is not perfect, this portion of the *Neely* holding is useful here:

> In the case before us, petitioner won a verdict in the District Court which survived respondent's motion for judgment n.o.v. In the Court of Appeals the issue was the sufficiency of the evidence, and that court set aside the verdict. Petitioner, as appellee, suggested no grounds for a new trial in the event her judgment was reversed, nor did she petition for rehearing in the Court of Appeals, even though that court had directed a dismissal of her case. Neither was it suggested that the record was insufficient to present any new trial issues or that any other reason required a remand to the District Court. Indeed, in her brief in the Court of Appeals, petitioner stated, "This lawsuit was fairly tried and the jury was properly instructed."

386 U.S. at 329-330, 87 S. Ct. at 1080, 18 L. Ed. 2d at 85. Based on those circumstances, this Court held that the *Neely* Court of Appeals was justified in not permitting the district court to grant a new trial.

The circumstances presented to the Fourth Circuit in this case in July of 1996, were remarkably similar to the facts of *Neely*. Officer Hetzel, too, urged the Fourth Circuit to confirm the jury's verdict, on the grounds that the record fully supported it, that the facts were fully and fairly tried, and that the jury was properly instructed. In fact, she has never, throughout the course

of this litigation, presented any grounds for why the record of the first trial should be thrown out, other than her desire for a larger verdict than the Fourth Circuit will permit her to recover if she is limited to the evidence she presented at the first trial.[9]

In sum, Officer Hetzel found *no* fault with the conduct of the first trial until she learned that the Fourth Circuit would not countenance a verdict which was clearly excessive as a matter of law. The Court of Appeals was fully justified, under the Constitution, the United States Code, and prior opinions of this Court in preventing Officer Hetzel from using the first trial of this case, enormously expensive and time-consuming as it was, as nothing more than a dry run or dress rehearsal for another attempt to score a huge verdict with no material evidence against these Respondents.

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9. It is worth noting, as a practical matter, that it will be impossible for her to produce any evidence which does away with the most important "deficiencies" the Court of Appeals found in her claim for damages against the County. In holding the verdict excessive, the Fourth Circuit pointed to the fact that Officer Hetzel is still an officer in good standing with the Police Department, who has not suffered actionable discrimination or harassment. She did not seek medical or professional treatment of any kind for her claimed emotional injuries. She herself, in testimony, attributed much of her emotional distress to her erroneous impression that she was the victim of discrimination. She cannot produce evidence that does away with these facts. A second trial of this case would be a sheer waste of judicial resources.

CONCLUSION

This Petition should be denied because the only real issue it raises is a challenge to an eighteen-month old decision of the Fourth Circuit Court of Appeals which has already been subject to review under the Seventh Amendment by this Court and rejected. Further, Officer Hetzel's challenge to the Fourth Circuit's mandate, even if it were timely or on an issue she had not already waived, is meritless.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA FILED DECEMBER 23, 1997

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

CASE NUMBER: CA 94-919-A

JANICE E. HETZEL,

PLAINTIFF,

V.

COUNTY OF PRINCE WILLIAM, ET AL

DEFENDANTS

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that a judgment in the total amount of $15,000 be and is entered in favor of plaintiff, Janice Hetzel, against the defendants, the Board of County supervisors of Prince William County, Virginia; and Charlie T. Deane, Prince William County Police Chief.

December 24, 1997
Date

Norman Meyer, Jr.
Clerk

s/ Raymond Hinder
(By) Deputy Clerk

Appendix A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 94-919-A

JANICE E. HETZEL,

Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,

Defendants.

ORDER

The procedural history of the post-trial litigation in this action is described in this Court's Memorandum Opinion entered on June 24, 1997. After that Opinion and accompanying order issued, defendant appealed the Court's decision to set a new trial date for a retrial of the damages issue, and, in the alternative, petitioned for a writ of mandamus. The former relief was denied because the appeal was deemed interlocutory in nature and the latter was granted. On September 15, 1997, the Fourth Circuit stayed the retrial of the damages issue and ordered this Court to recalculate the plaintiff's damage award for emotional distress. This Court was further ordered to enter final judgment on the damages issue and in so doing to "closely examine" the damage awards made in *Bradley v. Carydale Enter*, 730 F. Supp. 709, 726-27 (E.D.Va. 1989) and *McClam v. City of Norfolk Police Department*, 877 F. Supp. 277, 284 (E.D.Va. 1995) which awards

Appendix A

the appellate court believed to be "comparable to what would be an appropriate award in this case."

The Court has carefully reviewed the two decisions cited in the original opinion and in the Order. *Bradley*, 730 F.Supp. 709, was a bench trial involving claims by an African American plaintiff that her landlord had discriminated against her on the basis of race by ignoring her claims of racial harassment and then retaliated against her because she had complained about the harassment. The Court found against plaintiff on her discrimination claim but also found that she had made out a claim of retaliation. In awarding plaintiff $9,000 total damages for her retaliation claim, the Court found that the plaintiff, "a quiet person who tends to stick to herself" was "deeply wounded" by being called "a nigger." *Id.* at 726. She became teary on the stand even three years after the events. The trial court also found that plaintiff had been humiliated and embarrassed, and had become restless. But he also found that her damages had to be limited because she continued to live in the apartment building, never sought counseling, medical treatment or lost work time. *Id.* at 727.

In *McClam*, 877 F.Supp. 277, another bench trial, a police officer alleged that because of retaliation for filing racial discrimination complaints his department denied him a requested transfer. The trial court found that plaintiff had made out a case of retaliation and awarded plaintiff $900 in compensatory damages for tangible damages (lost pay supplements) and $15,000 in intangible damages for headaches, difficulty with sleeping, lowered self esteem and feelings of not wanting to go to work, which the Court found were damage awards consistent with what other courts had awarded for intangible injuries resulting from violations of civil rights. *Id.* at 284.

Appendix A

In light of the Order of September 15, 1997, we conclude that the Fourth Circuit has directed this Court to enter a judgment in plaintiff's favor in an amount somewhere between $9,000 and $15,000. Because this plaintiff was reduced to tears in front of some co-workers while at work when retaliatory disciplinary proceedings were instigated against her, that anguish and humiliation justify an amount at the high end of the range found appropriate by the Fourth Circuit. For these reasons, it is hereby

ORDERED that a judgment in the total amount of $15,000 be and is entered in favor of plaintiff, Janice Hetzel, against the defendants, the Board of County Supervisors of Prince William County, Virginia; and Charlie T. Deane, Prince William County Police Chief.

The Clerk is directed to forward copies of this Order to counsel of record and to enter a judgment, pursuant to Fed. R. Civ. P. 58 in favor of plaintiff.

Entered this 23rd day of December, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United Stated District Judge

APPENDIX B — TRANSCRIPT OF MOTION PROCEEDINGS DATED DECEMBER 20, 1996

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION
NO. 94-919-A

Alexandria, Va.
December 20, 1996

JANICE E. HETZEL,

Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, et al.,

Defendants.

VOLUME I OF I
TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Charlson & Bredehoft, P. C.
By: ELAINE C. BREDEHOFT, ESQ.
11260 Roger Bacon Drive, Suite 201
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Appendix B

For the Defendants: County Attorney's Office
By: SHARON E. PANDAK, ESQ.
1 County Complex Court
Prince William, Virginia 22192

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BY: BERNARD J. DiMURO, ESQ.
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Alexandria, Virginia 22314

* * *

[3] P-R-O-C-E-E-D-I-N-G-S

THE CLERK: Civil Action No. 94-919-A, Janice E. Hetzel vs. County of Prince William, et al.

MS. BREDEHOFT: Good morning, Your Honor; Elaine Bredehoft representing the plaintiff, Janice Hetzel.

THE COURT: Ms. Bredehoft.

MS. PANDAK: Good morning, Your Honor; Sharon Pandak representing the defendants.

THE COURT: All right, good morning.

All right, before me is the plaintiff's motion to set a trial date and for ancillary relief.

I think, frankly, Ms. Bredehoft, that motion is probably miscaptioned, because I have looked very carefully at this Fourth Circuit opinion; and I have looked at your brief, the reply brief, your reply brief to that and the County's response to that.

Appendix B

This case is in a very unique posture, and I have looked at cases cited by the Fourth Circuit and other ones as well. I don't think any of them were in quite the posture that this case is in, because what we have here is civil case where the jury came in with an award. I set part of it aside, but it basically still left a large part of it in place.

The Court of Appeals affirmed all of the legal rulings of the trial, found no defects in the trial itself, [4] no problems in the jury instructions or the evidentiary calls, but set aside the verdict in the case finding that the amount of compensatory damages awarded by the jury were excessive and, in effect, resulted in a miscarriage of justice based upon the evidence and the causes of action that were left in the case. That's what the Fourth Circuit has done.

The Fourth Circuit explicitly reversed the judgment of the District Court and remanded the case for recalculation of damages for emotional distress and also recalculation of attorneys' fees, and that is the limit of what the remand to this Court has.

I read the Fourth Circuit's direction to me to tell me I am to do two things and only two things, and that is to set a new amount of damages and then to recalculate the attorneys' fees.

I see nothing in this opinion that tells me that I am to conduct a new trial because, in fact, the original trial has been affirmed by the Court of Appeals.

And even though, Ms. Bredehoft, you have very articulately argued that this Court is, in effect, going to to be ordering a remittitur and that under the 7th Amendment and the case law

that you cite, when a remittitur is presented to a party, that party has the option of accepting the remittitur or rejecting it and then going to [5] a new trial, I can't find that latitude in the way in which the Fourth Circuit has returned the case to me.

I believe that's pretty much the position that the County has taken, and that is that, in fact, all this Court is authorized to do is to set a new damage figure; and that's it, and attorneys' fees.

What I am going to do is the following: I am, in fact, going to set or recalculate the damages, and I am going to announce that this morning from the Bench.

On the attorneys' fees, to be honest with you, I didn't get enough time to look over those numbers again in Chambers, but they would obviously be connected to or related to the amount of damages that I recalculate.

I have looked very hard at this case. I tried it. It was an eight-day trial. I have some real concerns, because I think this was a very intelligent jury, and, counsel, you can correct me if I am wrong, but isn't this the case where, after the trial, at least one juror contacted counsel and wanted to talk to you all?

MS. PANDAK: That is correct, Your Honor.

THE COURT: All right. Did that same juror — and did you talk to the juror?

MS. PANDAK: Yes, Your Honor.

THE COURT: Did the juror talk to plaintiff's counsel as well, Ms. Bredehoft?

[6] MS. BREDEHOFT: Not that juror. Another juror contacted me, Your Honor.

THE COURT: Can you share with me what the jurors said? I am just curious. I don't want to know who said what, but just basically what did they say?

MS. PANDAK: I apologize to the Court. My memory is a bit dim on this.

THE COURT: Mr. DiMuro is here. I think he actually was the person who called me.

All right, Mr. DiMuro?

MR. DiMURO: Excuse me for not being here earlier, Judge. Judge Ellis just took a break.

That juror said that when it came to — he gave us some sense of how they broke down on the loss claims, but when it came to the retaliation claim and the size of the verdict, a small minority of jurors did not want to go for the plaintiff even on the retaliation claims and that he was the most vocal of that, I think, two-person block; but he finally gave in, because he thought he knew that judges would sometimes take away verdicts and reduce them and fix the problem.

We carefully looked at the rules relating to when do you bring what jurors say back to the Court, and, while I thought that that matter was a significant insight, I couldn't infer — Ms. Pandak and I could not in good faith [7] say that that fits within the law that permits you to bring that to the Court's attention, so we did not. But he did indicate he had trouble, significant trouble, with the verdict.

THE COURT: Did he give an idea of what he thought the verdict should have been?

MR. DiMURO: Zero. He didn't think the plaintiff should prevail on that matter.

I guess, I think we also confirmed that they meant to stack the quarter-million-dollar units, but you had already polled the jury on that.

THE COURT: I polled them on that.

MR. DiMURO: I believe so.

THE COURT: The poll was consistent with what he said, right?

MR. DiMURO: That is right.

THE COURT: Ms. Bredehoft, you spoke with a different juror then?

MS. BREDEHOFT: Yes, Your Honor, and I heard quite a different story. I guess thatch maybe one of the reasons why those aren't supposed to be considered by the Court. The juror who spoke with me called me on her own and indicated that the difficulty with the jury was that a significant number of them also wanted to find in our favor on discrimination and that they compromised, that everyone [8] believed that retaliation had occurred, but there was significant dispute on the discrimination claims.

I think she gave me the split, but, frankly, I can't remember

what the split was. So I don't want to represent it to the Court. But she talked about specific evidentiary issues and what they felt were significant and what they didn't think were significant. But at no time did she indicate that anyone did not want to give significant damages. It was an issue of whether there was also a finding on discrimination, the underlying discrimination.

THE COURT: All right. It's interesting. The only reason I have asked, frankly, I have already pretty much made up my mind on the recalculation, but I was just curious since it's not common for us to have jurors who were sufficiently interested in the case to go that step themselves to initiate contact with counsel.

As I recall, this was an eight-juror panel. It was more than the standard six, so there was a little bit more input. As you may know, there has been some talk about the need or the wisdom of going up to 12-person juries in civil cases. It has not passed, but one of the arguments for that is when you have more jurors, you have a wider cross-section of the community; and your civil judgments may have more sense of reliability or whatever. [9] And so I do note that it is interesting that we had more than the six giving their judgment in this case.

I looked very carefully at the cases that the Fourth Circuit pointed me to in terms of similar damage awards, which they have suggested I look very seriously at, and I did.

On the other hand, I still believe that every case is its own unique case. Every plaintiff brings his or her own set of issues to a trial, and there is nothing that I find in any of the law that says that there are automatic limits on damage awards for particular causes of action of this sort. In the civil-rights area,

each case is a fact-specific case, and that's the way our system works.

The Fourth Circuit, which did have a disadvantage in that it was looking at a cold record, did not seem overly impressed with my comment or observation that we had watched Ms. Hetzel for two days, and I watched her demeanor on the stand; and I am going to assume that I was not specific enough or articulate enough when I denied the defendant's motion for a new trial when I addressed that issue.

But, you know, we have jury instructions that we give — and they are completely approved by the courts of appeals — to a jury that, for example, the jury looks at the quality of the evidence, not the quantity, and in terms [10] of the testimony of witnesses, the testimony of one witness alone on a particular issue, if the jury finds that witness to be credible or more credible than the witnesses testifying to the opposite proposition, the jury has a right to believe that one witness' testimony even in the face of the testimony of seven or eight who will say the opposite.

We tell the jury that in making evaluations about the credibility of matters, that they need to look at, among other things, not just what a witness says but their demeanor on the stand. It is not inappropriate — in fact, it is completely consistent with what we tell the fact finder — to take into consideration demeanor in evaluating the credibility of a witness.

Now, in Ms. Hetzel's case, we have a woman who has ventured into a predominantly male world. She was a Marine. There still are not that many women in the Marine Corps. Of course, the Marines pride themselves on being tough, and my

observation of Ms. Hetzel or Officer Hetzel is that she probably tries to be too tough; and I think some of the comments I may have made about how I think she in some respects may be her own worst enemy, and why I was reluctant to grant her the relief of the promotion was partly a result of that.

She is now in a police agency which, of course, [11] is — the Fourth Circuit characterized it as a paramilitary agency — where again a sort of toughness is a value. And this woman, who is working in a predominantly male, tough male world, was reduced to tears not only in court, and my evaluation of those tears was that they were not crocodile tears. They were real. I think that the jury's verdict in part was consistent with their evaluation of the demeanor that I saw.

But there was also clear evidence in the trial, in the incident in the restroom, and the Fourth Circuit does note that in their opinion, from the corroborating witness, that in relation to the Internal Affairs business she was again reduced to tears, locked herself in the restroom, and I think it was the sergeant had to come in and get her.

That is a very significant incident in my view, which is not present in the other cases to the same degree. Of course, I didn't try those other cases that I was directed to look at. I tried this one. I saw this plaintiff. I heard this testimony. Her emotional distress has real.

For a woman who is trying to fight off the image of being soft, working in a man's world, to be reduced to fears at the workplace is a significant problem. I think that is a significant injury. Her image with those other [12] officers is affected by that.

And certainly, again, her deportment in court, I think, is something that was appropriate for the jury to look at.

Having said all that, I am satisfied that there is enough evidence in this record to support a damage award for the emotional distress, and I am going to enter an award of $50,000, which I am aware is higher than that of most of the cases that the Court of Appeals addressed me to, but I believe that in this case these facts, it's a fact-specific case.

As I said, given the fact that we tell jurors to look at the demeanor of witnesses, et cetera, and given the huge size of the judgment that they came up with, that $50,000 is not an outrageous amount nor is it an amount that cannot be justified from this record.

I also note that I have been involved in many settlement conferences and that a number in the $50,000 range has not been uncommon for settlements of cases involving allegations of retaliation and resulting emotional distress and mental anguish, and that sort of thing. So I think that this is a fair and appropriate number.

Now, Ms. Bredehoft, you have indicated, sort of doing a preemptive strike, in effect, with your motion that [13] your client is unwilling to accept a reduced amount. You didn't know what the reduced amount would be. Maybe you were looking at the cases that the Fourth Circuit had pointed me to. But does that decision of this Court in any respect change your position on your motion for a new trial?

MS. BREDEHOFT: Frankly, Your Honor, I would have to consult with my client before making that determination. I do

construe this as a remittitur. I think that does comport with our argument.

But I would need to consult my client on that before stating that in some way we reject or accept that. I understand Your Honor's ruling that we don't have a choice on that, but I would like to consult with my client.

THE COURT: I am going to give you something in addition to think about with your client, all right.

If your client does not accept the amount, I am not granting a new trial. So you can take this right back to the Fourth Circuit.

However, I want the record to be clear that if the Fourth Circuit determines that I am in error in not giving you the option of a new trial, because as I said, as I literally read their decision, I don't have that, they have not asked me to do that.

The new trial that I would conduct, so that we [14] can get it all resolved at one time, would be limited to the issue of a trial on damages. In other words, the Fourth Circuit has already found that the liability was properly established, so we would not go back into equal protection or anything else.

The parameters of the trial would be, number one, I would tell the jury that there has already been a finding — I don't know how I would tell them — but effectively that the County did retaliate against the plaintiff in these two specific areas, where the Fourth Circuit has said it is properly supported by the evidence; and I would tell the jury that it's going to be their job to determine whether or not any compensatory damages are appropriate for the emotional distress component. All right?

And, although I will probably give you a little bit of leeway on discovery, your damages are limited to the day the trial started.

After the trial, it's not fair in my opinion or appropriate to bring in additional damages. I would not permit that. If your client is suffering additional damages, I think the appropriate remedy is to file a new lawsuit. But this case, if it goes to a retrial, is simply a retrial based upon those parameters.

Is that clear for the County as well?

MS. PANDAK: Yes, Your Honor. I understand that [15] aspect of the ruling.

THE COURT: I think it's important for that to be before the Fourth Circuit, because if they do decide that I had to give you the option for a new trial, then I actually am hoping that they will also address, and that you can complain to them that these are the parameters, because you are asking for much more than that. You are asking, as I understood your pleadings, to get into discovery.

I think you mentioned there had been ongoing problems for your client in terms of other things that had been happening to her in the form of retaliation, or that her emotional distress may have gone on after the trial. I don't think it's appropriate to bring that in in this context. As I said, maybe there is a new lawsuit out there.

I am just giving everybody notice as to what I would be doing. And to the extent that I am trying to reduce the amount of times this case goes back and forth, that way at least the

Court of Appeals has an opportunity to see what I would have in mind for a new trial. And to the extent that you don't agree with that, Ms. Bredehoft, or frankly, that the County doesn't agree with that, that that could be as well briefed for the Court.

MS. BREDEHOFT: Your Honor, may I ask a question of clarification on that? Would that also, would Your [16] Honor's ruling also then restrict so that the jury would be told they are only to assess damages up to January 23, 1995, and that there can be no testimony of any nature subsequent to January 23, 1995?

THE COURT: Correct.

MS. BREDEHOFT: So, for example — I was just trying to think of a couple of examples. Let's say Janice Hetzel went up and gave Chief Dean a big kiss and hug a year later, that would not be something that they could do — I'm sure it didn't happen — but I'm trying to think —

THE COURT: (Interposing) It would apply to both sides. In effect, the case is limited to the parameters of the case.

MS. BREDEHOFT: That's what the jury would be told under Your Honor's ruling?

THE COURT: Right.

MS. BREDEHOFT: Thank you, Your Honor.

THE COURT: In terms of attorneys' fees, I haven't looked at that yet. Obviously, I cannot and will not impose a higher attorney fee than the recovery. And obviously there has been a significant diminution.

I think what I am probably going to do is basically a percentage that would be consistent with the percentage reduction.

Now, I reduced in effect the jury award, I [17] believe, by 90 percent. Aren't we down to ten percent? It was $500,000. I think the most appropriate way to do it, because I did spend a lot of time, as I recall, going over all your calculations, I am simply going to reduce the attorneys' fees 90 percent as well. That won't make you very happy, but at least that way you got closure today.

MS. BREDEHOFT: There is a specific Supreme Court decision that rejects the notion of doing a percentage, Your Honor. I would like to be able to argue that if Your Honor is inclined to. For example, we just had a case in this court in which our retaliation recovery was $55,000, and Judge Cacheris awarded, I believe, $60,000 in attorneys' fees and costs. We had another in which the award was $85,000 and Judge Bryan awarded the attorneys' fees of somewhere in that same neighborhood of $60,000.

THE COURT: I will permit you to rebrief that issue. Then the County will have an opportunity to rebrief that as well.

MS. BREDEHOFT: Thank you, Your Honor.

If you would like to give us deadlines to do that, I am happy to do that today as well. It is the holiday, so —

THE COURT: (Interposing) January 10th for the plaintiff's brief to be in.

Does the County think it could respond within a [18] week? Or is that not giving you enough time?

MS. PANDAK: Your Honor, it is seven working days, but I think five days might be too short.

THE COURT: All right. Let me give you two weeks. There is no rush on this case, is there, for anybody? So that would give you until the 24th, right; 10 and 14 is 24.

Then we get your response on the issue of attorneys' fees.

Does the County want to be heard, just for the record?

MS. PANDAK: Yes, Your Honor, I would like to be heard.

THE COURT: Yes, ma'am.

MS. PANDAK: Your Honor seems to have made up her mind, so this may be somewhat pointless. I would have to take exception to the setting of the damages.

I think that — but before going to that, I want to touch on what the Court has said with respect to the new trial so that I can understand in the event that that may come back. The Court said that you were going to give a little bit of leeway with respect to discovery, and I don't really understand what that means.

The case has had an incredible amount of discovery. I don't think I have found any case in which [19] there have been as many documents turned over as this one. Numerous depositions were taken. I am not sure what additional discovery there would be.

THE COURT: For example, I don't recall that Ms. Hetzel's husband testified. Many times in these cases of emotional distress, the plaintiffs will put on the spouse or close colleagues or family workers who will address the issue of what they noticed about the person's demeanor, whether they were having headaches.

I think part of the problem in this case, you know, one of the concerns I have got is I would hate to see this opinion used by plaintiff's counsel to go out and start getting all kinds of psychologists to start looking at their clients when the client hadn't gone to the psychologist while the events were going on.

It seems to me that a person or the people around a person can just as adequately testify if someone is, for instance, having sleepless nights, and it's not enough to go to a doctor, but you know the spouse is saying, "I can't sleep with my spouse anymore because she is up walking around all night." That's evidence which a jury could look at.

So all I am saying is the type of discovery that I would permit, and I see it as extremely limited, and, frankly, I would think your side might be more interested [20] in it than the plaintiff would be if she has additional witnesses that she plans to call to testify to her mental state in that time period, as it related to the retaliation business, then I would give you the opportunity, of course, to depose such people.

MS. PANDAK: Your Honor, we have deposed the plaintiff's husband, and, in fact, he didn't even know or had any feelings that there was any change in her. He knew about the suit only what he read in the paper. So we thought that it was not prudent to put somebody's husband on the stand on our own account.

THE COURT: Then there may not be much new discovery.

MS. PANDAK: That's my concern. The Court of Appeals did not talk about there being any amount of evidence. The plaintiff never argued it. So to now allow the plaintiff to bring in new evidence of what her damages might be seems to me to be inconsistent with the Fourth Circuit's ruling.

The second aspect of that is — and Ms. Bredehoft attempted to elicit from the Court as to when the time would stop in terms of evidence with respect to damages — I agree with the Court that she cannot bring any more damages evidence in of damages that she had prior to the trial than what she had at that point in time. And [21] certainly anything in the future would have to be the subject of a new action.

But I would note for the Court that the Court of Appeals took note, and this Court, I believe, took partial note, that with respect to what seemed to be the culminating event, this 1995 Internal Affairs investigation, that Ms. Hetzel had only an oral reprimand and a requirement to go get additional Miranda rights training. That was in the Fourth Circuit's opinion.

That was not a matter that was before the jury. In fact, we argued, as the Court will recall, that that investigation should not have been before the jury at all because it at that point had only been initiated, and she had suffered no damage. But I think that is something where, to avoid the problems with which the first trial was fraught, that because the Fourth Circuit cited in its opinion, that constraints would need to be put on a jury with respect to that particular item.

THE COURT: Those are fine evidentiary calls that I think

can only happen in the context of the trial. I wanted to give you all a heads-up on the broad parameters of the fact that it will be a significantly limited trial, limited solely on the issue of damages within a specific time period, and I think that is enough guidance.

MS. PANDAK: I appreciate that, Your Honor.

[22] Finally, Your Honor, with respect to the damage award, the County unfortunately will have to take that matter up again to the Fourth Circuit, not only because it's not within the parameters that the Fourth Circuit has set — and we had planned to brief to the Court, if the Court had chosen, a briefing schedule in advance of awarding the damages — that the lack of evidence when you view it simply from the retaliation end and simply from the perspective of the little injury that this plaintiff suffered, I think that unfortunately, with due respect to the Court, I think you fall afoul again of the various things that the Fourth Circuit has already pointed out with respect to this case.

The defendants believe that the damages based on what Ms. Hetzel suffered certainly don't even go near what was suffered in the McClan case and the Kerrydale case: Crying in the bathroom for 45 minutes, particularly when members of her squad testified that they felt she was still a colleague and didn't think her to be diminished at all in terms of their esteem for her.

THE COURT: But, you know, that's not really the issue. The issue is what she thought of it herself.

MS. PANDAK: Your Honor, I agree. Your Honor correctly noted when you rendered the decision on the judgment NOV request by the County that Officer Hetzel had [23] distorted

impressions of things. And, in fact, one of the reasons the Court refused to impose an injunction against the police department was the concern that Officer Hetzel would perceive anything as retaliation or discrimination in the future, based on the condition in which Your Honor found her.

Finally, Your Honor, I think also since both the McClan and Kerrydale cases, which the Fourth Circuit had to look at the time that they rendered the initial opinion, there have been opinions since that time that have come down with even smaller damage awards than the $3,000 to $5,000 range for injuries or lack of injuries of the type of emotional distress that Officer Hetzel speaks of.

I just wanted to note for the Court that we are troubled and unfortunately will have to probably take this up. I need to consult with my client, obviously.

THE COURT: One of the things I am going to suggest to both sides, too, is before you go back, I mean, certainly there are very interesting issues in this case. Frankly, I would be kind of interested in seeing what happens. You may also want to consider sitting down with a Magistrate Judge for a few minutes and resolving it. To me, the numbers are not so great any longer. There are transaction costs involved in appeals as well. So that's up to you all.

[24] But this case has certainly gotten a great deal of attention. I am still really concerned about the fact that we tell the jury certain things in our jury instructions, and then they act on that. And then I am concerned about some kind of mechanical, and I don't believe the Fourth Circuit actually has intended this, they wanted the Court to look with care and, as I said, I was

criticized, and properly so, for not giving more detail in my ruling on your motion for new trial; and that happens sometimes.

But, as I said, when you think about what we tell jurors, the fact finders, and the basis upon which they can make their decisions, and yet at the same time we are saying, yes, but the demeanor of the witness can't be believed in this respect or shouldn't be given this much credence. It does appear to me to be significantly inconsistent.

And the simple fact is I have looked very carefully at the other cases, and there certainly are more than just the two the Fourth Circuit cited me to. There has been at least one post-Hetzel case in the Fourth Circuit where they also supported a very, very low judgment, where again Hetzel was cited for that proposition.

But unless we are going to do away with the [25] concept of jury trials and juries setting damages, each case with each plaintiff and each set of witnesses is a unique, legal puzzle; and there must be great care taken not to start putting in mechanical rules or mechanical ceilings when there is simply no basis that I can see in the statutes for it.

The juries are told that compensatory damages must be based on reason. They are not to be based on suspicion or just pulled out of the air.

There are facts in this record which do support quite clearly a finding of emotional distress as a result of these actions. And, as I said, I think the jury is proper to look at a plaintiff, and in this case it wasn't just the plaintiff alone. Now, it wasn't overwhelming evidence, but there was clearly evidence there. I

have now been put in a position, and I have done it, of reducing that damage award.

You know, I recall that in centuries earlier, if a man's reputation were impugned, he would go to a duel to the death, just the fact that somebody is insulted. An Internal Affairs investigation, I think that anybody in the public sector who is even told they are under investigation, that's a terrible effect on a person.

The fact that the ultimate outcome was relatively de minimis doesn't change the fact that that was a very [26] significant impact on that person.

Look at the poor attorney we had in here earlier today who I had to sanction and how miserable he feels.

Now, you can argue, well, what price do you put on humiliation or that kind of human misery? It's the same problem you have in a pain-and-suffering case, in a personal-injury case or wrongful-death case. How do you put a price on that? And we ask juries to do that all the time.

I just think we have to be very, very careful in becoming too formalistic. I have looked at this case. I looked at this plaintiff. I looked at the totality of the evidence. I have restricted my view in the context of what is left of the case.

The 45-minute, crying-in-the-bathroom scene is a significant instance in this case, and the sergeant's concern about her was significant. And, as I have said, those are the kinds of reasons for which I think this number is not an unreasonable number, despite the fact that there are many cases out there that have given greatly reduced figures.

I suggest that you all, both sides, give some serious thought to thinking about the transaction costs and the other costs in further litigation. And if you want a Magistrate Judge to try to mediate a resolution with you [27] all, that's fine.

Otherwise, I have given you the briefing schedule, and I will see the briefs. I will set the attorneys' fees, and then you all decide what you want to do from there, all right.

MS. PANDAK: Thank you.

MS. BREDEHOFT: Thank you.

THE COURT: Ms. Bredehoft, what you are probably going to have to do, in addition to the attorneys' fees business, is after I have resolved that, then you are going to formally need to notify the Court about whether you accept the $50,000 or you want the new trial.

If you want the new trial, then I need to enter an order that formally denies it, puts in what I have just said in court, and then you can take the case up for further review.

MS. BREDEHOFT: We should wait until after Your Honor makes the decision on attorneys' fees and then make a decision. That makes sense.

THE COURT: Yes, because you need to let me know. At this point, I am not doing anything, having told you what I am going to do.

MS. BREDEHOFT: Thank you.

THE COURT: Thank you.

(Whereupon, the motion proceedings were [28] concluded, and court was recessed.)

APPENDIX C — CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTORY PROVISIONS

§ 28 U.S.C. 1651 — WRITS

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

§ 28 U.S.C. 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances.

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *GRIER V. TITAL CORPORATION*, 121 F.3D 698 (4TH CIR. 1997) DECIDED AUGUST 15, 1997

Celindah J. GRIER, Plaintiff-Appellant,

v.

The TITAN CORPORATION, Defendant-Appellee.

Celindah J. GRIER, Plaintiff-Appellee,

v.

The TITAN CORPORATION, Defendant-Appellant.

Nos. 97-1167, 97-1168.
United States Court of Appeals, Fourth Circuit.
Argued: July 7, 1997.
Decided: Aug. 15, 1997.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis, III, District Judge; Albert V. Bryan, Jr., Senior District Judge. (CA-95-900-A)

* * *

Before LUTTIG and WILLIAMS, Circuit Judges, and Joseph F. ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Appendix D

OPINION

PER CURIAM:

Appellant, Celindah Grier, brought Title VII claims for constructive discharge and retaliation against her former employer, Titan Corporation. The claims were tried to a jury twice. The first jury awarded Grier both compensatory and punitive damages on her claims. Subsequently, the district court granted Titan's Rule 59 motion for a new trial on Grier's Title VII retaliation and constructive discharge claims, ruling that the jury's verdict was against the clear weight of the evidence.[1] Grier's claims were then tried to a second jury, which also returned a verdict for compensatory and punitive damages on both Grier's retaliation claim and her constructive discharge claim. The district court then entered judgment as a matter of law under Rule 50 for Titan on the constructive discharge claim and on the punitive damages award. The district court denied Titan's motion for judgment as a matter of law on Grier's retaliation claim, and also denied Titan's motion for a new trial.

This appeal followed. Grier appeals the trial court's grant of a new trial after the first trial; she also appeals from the district court's grant of judgment as a matter of law on her constructive discharge claim and punitive damages award after the jury verdict in the second trial. Titan cross appeals the court's denial of its Rule 50 motion on Grier's retaliation claim following the second trial.

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1. The district court also granted Titan's motion for judgment as a matter of law on Grier's claim for constructive discharge under Virginia law. Relying on our decision in *Hairston v. Multi-Channel TV Cable Co.*, 1996 WL 119916 (4th Cir. March 19, 1996) (per curiam), the court held that Virginia common law provided no such cause of action.

Appendix D

The district court granted judgment as a matter of law on Grier's constructive discharge claim because it concluded that, although "the record may be adequate for a reasonable trier of fact to find that defendant deliberately intended to force plaintiff to resign, it does not allow a reasonable trier of fact to conclude that plaintiff's work environment was objectively intolerable." District Court Order of Dec. 24, 1996, at 4. Grier's evidence demonstrated that her working conditions "may have been unpleasant and even subjectively intolerable," *id.* at 10, but did not — as required to prove constructive discharge — leave her "no choice but to resign." *Id.* at 4 (quoting *Blistein v. St. John 's College*, 74 F.3d 1459, 1468 (4th Cir.1996)).

Specifically, the district court found that any reduction in Grier's work opportunities "was not only prospectively temporary, but also quite brief." *Id.* at 7. Additionally, Grier's "chief reason for leaving" — Titan's failure to address both Grier's claims of retaliation and her underlying claims of gender discrimination — did not evidence an objectively intolerable environment. Rather, said the district court, Grier was attempting to "bootstrap tolerable conditions into an intolerable working environment by claiming that [the] employer responded inadequately to complaints concerning the tolerable workplace."[2]

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2. Moreover, we note that there was no evidence that Titan's failure to respond to Grier's underlying claims of gender discrimination was a targeted attempt to compel Grier to resign. *Cf. Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir.1989) (Wilkinson, J., concurring in part and dissenting in part) ("Although a failure to act in the face of known intolerable conditions may create an inference that the employer was attempting to force the plaintiff to resign, such an inference depends upon some evidence that the inaction of the employer was directed *at the plaintiff*.") (emphasis in original), *adopted by* 900 F.2d 27, 28 (4th Cir.1990) (en banc) (per curiam).

Id. at 8. Nevertheless, the district court also found that there was sufficient evidence for the jury to find that Titan had taken retaliatory measures against Grier, even though those actions — taken together — did not create an objectively intolerable workplace.

As to the punitive damages award, the district court held that there was "no evidence in the record that any retaliatory acts by defendant were conducted with malice, ill-will, spite or hatred." *Id.* at 11. Moreover, there was no evidence — beyond that required to show that Titan had intentionally retaliated against Grier — to demonstrate that Titan acted with "reckless indifference" to Grier's federally protected rights. *Id.* at 10-11. Reasoning that "the 'reckless indifference' standard for awarding punitive damages must require more than a showing of intentional retaliation" to avoid making punitive damages available in all retaliation cases, the district court granted judgment as a matter of law on Grier's punitive damage claim as well. *Id.* at 12.

In sum, after presiding over two complete jury trials of Grier's retaliation and constructive discharge claims, the district court was convinced that there was insufficient evidence to support Grier's constructive discharge claim and her punitive damage award. Of course, the fact that two successive juries found in Grier's favor counsels caution in setting aside the second jury's verdict as unsupported by the evidence. *See Massey-Ferguson Credit Corp. v. Webber,* 841 F.2d 1245, 1250 (4th Cir.1988). However, the district court was quite clear on the record below that it allowed Grier's claims to go to the jury the second time, not because it believed there was sufficient evidence to support them, but because it was concerned that this court would apply more lenient standards for constructive

discharge and punitive damages. Thus, the district court allowed the case to go to the jury so that there would be no need for a new trial if we disagreed with the court as to the proper standards to be applied to Grier's claims. JA at 6605, 6637.

Having reviewed the record, the arguments and briefs of counsel, and the order of the district court, we believe that the district court correctly applied the proper standards in this case, and we affirm on the reasoning of the district court.[3]

AFFIRMED.

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3. It is far from clear that the district court's grant of a new trial after the first jury trial is reviewable by us at this time. However, even assuming that the grant of the new trial is now reviewable, the district court did not abuse its discretion in concluding that the first jury's verdict was against the clear weight of the evidence, and thus, that a new trial should be ordered. Because the records in the first and second trials were so similar and because the grant of a new trial is reviewed for abuse of discretion — rather than de novo as is the grant of judgment as a matter of law — our holding that the defendant was entitled to judgment as a matter of law on the constructive discharge claim after the second trial means, *a fortiori,* that the district court did not abuse its discretion in granting a new trial after the first trial based on the same concerns about the sufficiency of the evidence. Of course, the district court granted a new trial on the retaliation claims after the first trial, but refused Titan's request for judgment as a matter of law on that claim after the second trial. We are satisfied, however, that while the evidence of retaliation is enough to sustain a jury verdict, it is weak enough that a judge could find that such a verdict was against the weight of the evidence and order a new trial.

APPENDIX E — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *GILL V. SYSTEM PLANNING CORPORATION*, 121 F.3D 698 (4TH CIR. 1997) DECIDED AUGUST 25, 1997

Ann L. GILL, Plaintiff-Appellee,

v.

SYSTEM PLANNING CORPORATION, Defendant-Appellant.

No. 96-2172.

United States Court of Appeals, Fourth Circuit.
Argued July 9, 1997.
Decided August 25, 1997.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Senior District Judge. (CA-95-1683-A)

* * *

Before WILKINS, HAMILTON, and WILLIAMS, Circuit Judges.

OPINION

PER CURIAM

System Planning Corporation (SPC) appeals an order of the district court denying its motion for judgment as a matter of law after a jury awarded compensatory damages to Ann L. Gill

on her claims of retaliation in violation of Title VII, *see* 42 U.S.C.A. § 2000e-3 (a) (West 1994). Because we conclude that the jury verdict is not supported by substantial evidence, we reverse.

I.

SPC conducts research and development for the federal government, primarily as a defense contractor. During the spring and summer of 1994, when the events relevant to this litigation transpired, Gill was employed in SPC's Security and Information Systems Department (SISD), where her duties consisted of obtaining security clearances for SPC personnel and processing visitor requests. Additionally, Gill had been trained as a "LAN mentor," a person who could assist others with the operation of a computer network important to SPC's business. Although Gill regularly supervised other employees, her duties were primarily clerical.

Beginning in 1990, SPC found it necessary to reduce its work force significantly in response to decreases in federal defense spending. As part of this process, in early 1994 SPC employed a consultant, Dorsey Clement, to review the structure and operation of SISD. At that time, the department consisted of six people, including Gill; all were aware that the size of the department would be reduced in an effort to promote efficiency and cost-effectiveness. After conducting her review, Clement recommended that SISD be reorganized to consist of three new positions: A facilities security officer (FSO), an information systems security officer, and a document control specialist. All other positions in SISD would be eliminated.

Linda Easley, who was responsible for oversight of SISD, announced the availability of the FSO position in early May. Several individuals, including Gill and her immediate supervisor, Phyllis Moon, expressed an interest in the position. Easley interviewed Gill, Moon, and one other person before awarding the post to Moon in mid-June. Gill protested Moon's promotion, insisting that Moon was not qualified to be FSO and that she had been selected only because of her race. Gill expressed these concerns to personnel in SPC's human resources department, to Easley, to Easley's supervisor, and to Moon herself and informed them of her intent to file a charge of racial discrimination. Thereafter, Easley — who had previously been friendly to Gill — began to treat her in a "cold" and "businesslike" manner. J.A. 202.

After Easley transferred SISD employees to the remaining new positions recommended by Clement and two other SISD employees voluntarily resigned, Gill was left as the only member of the department without a position. When Easley met with Gill to inform her of this situation, she offered Gill a security-related position in another department. Gill declined the offer, stating that she did not wish to work there. Gill also refused a secretarial position before reluctantly agreeing to serve as a facilities assistant. Easley offered Gill that post because it entailed implementing plans to relocate a large number of SPC employees, a task with which Gill had previously demonstrated some skill. Her pay, benefits, and grade remained the same.

After the meeting, Gill went home and remained on sick leave for two weeks, so traumatized by the employment change that she became physically ill. Gill's condition worsened when she was informed that security files had been removed from her

office in her absence.[1] Gill's physician prescribed medication to alleviate her symptoms.

During the ensuing weeks, several incidents convinced Gill that she was no longer wanted at SPC. For example, upon reporting to her new position, Gill found herself in an office next to Easley and discovered that her duties consisted primarily of maintaining conference room supplies, packing boxes, and answering the telephone. And, although Gill had hoped to continue her activities as a LAN mentor, the computer in her new office was not powerful enough to support the LAN network. Shortly thereafter, Moon asked Gill to review some visitor requests while Gill was answering telephone calls at the front desk. Upon learning what Gill was doing, Easley instructed Moon to take the visitor requests away, stating that Gill no longer possessed the requisite security clearance. Moon did so, causing Gill to burst into tears. Gill also was not informed of a staff meeting that was announced while she was away on sick leave.

Almost immediately after her transfer, Gill began to seek employment elsewhere. Because SPC could not charge the expenses of her new position to any defense contract, Gill was concerned that SPC might lay her off in order to reduce its overhead expenses, a fear heightened by the fact that her responsibilities had been significantly reduced. Within a few days, Gill received an offer of employment from another company as an assistant FSO. Although she initially declined the offer because the salary was $4,000 less than her salary with SPC, Gill changed her mind after she observed a draft of a memorandum listing SPC employees that did not include her

1. Gill claims that her office was "cleaned out," but the record indicates that only the security files were removed.

name — an incident Gill describes in her brief as "a final cumulative blow." Brief for Appellee at 16.

After pursuing her administrative remedies, Gill filed this action in the district court alleging federal causes of action for discriminatory failure to promote and retaliation against SPC, — see 42 U.S.C.A. §§ 2000e-2 (a), 2000e-3 (a) (West 1994), and several state-law claims against SPC and Easley. The district court granted judgment to the defendants on Gill's state-law claims at various stages in the litigation, leaving only the federal issues for the consideration of the jury. The jury concluded that SPC had not discriminated against Gill, but returned a verdict in Gill's favor on her retaliation claims and awarded $80,000 in compensatory damages. After denying SPC's motion for judgment as a matter of law or for a new trial, the district court awarded attorneys' fees of $61,459.14. SPC now appeals.

II.

SPC primarily contends that the district court erred in denying its motion for judgment as a matter of law. We review de novo the denial of a motion for judgment as a matter of law to "determine whether substantial evidence exists upon which the jury could find for the appellee." *Benedi v. McNeil-P. P. C., Inc.*, 66 F.3d 1378, 1383 (4th Cir.1995). Thus, "[t]he question is whether a jury, viewing the evidence in the light most favorable to [Gill], could have properly reached the conclusion reached by this jury." *Benesh v. Amphenol Corp. (In re Wildewood Litigation)*, 52 F.3d 499, 502 (4th Cir.1995).

Gill's claims that SPC retaliated against her in violation of Title VII for pursuing a charge of racial discrimination rest on two distinct but factually related theories. First, Gill maintains

that SPC retaliated against her by eliminating her position in SISD and transferring her to another position. Second, she argues that SPC constructively discharged her in retaliation for her threats to pursue charges of racial discrimination; the constructive discharge allegedly was accomplished through the elimination of her original position, the transfer, and the poor treatment she received after the transfer. We conclude, however, that the evidence in the record is insufficient to allow a rational jury to find in favor of Gill on either of her retaliation claims.

In order to establish a prima facie case of retaliation, a plaintiff "must show that (1) he engaged in protected activity; (2) his employer took adverse employment action against him; and (3) a sufficient causal connection existed between his protected activity and his employer's adverse employment action." *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir.), *cert. denied*, 117 S.Ct. 70 (1996). The burden of production then shifts to the employer to articulate a legitimate, nonretaliatory reason for the adverse employment action. *See Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 479 (7th Cir.1995). Finally, the plaintiff must persuade the factfinder that the asserted reason for the adverse employment action is a mere pretext and that the true reason for the action was retaliation. *See id.*

Gill's first claim of retaliation — based on the elimination of her position in SISD and her subsequent transfer — must fail because, even assuming that she can establish a prima facie case of retaliation,[2] SPC articulated a legitimate, nonretaliatory reason

2. The validity of this assumption is by no means clear. For example, it is questionable whether Gill — who was transferred to a different position carrying the same grade, pay, and benefits — suffered an "adverse (Cont'd)

for its actions which Gill has failed to rebut. As Easley explained during her testimony, Gill's services were no longer necessary in SISD because her responsibilities, which had been primarily clerical and administrative, could be performed by computer. Our review of the record reveals no evidence to refute this explanation for the decision to transfer Gill to another department. Accordingly, substantial evidence does not exist to support a determination that SPC's asserted reason for Gill's transfer was mere pretext for retaliation, and the district court erred in refusing to grant SPC's motion for judgment as a matter of law on this claim.

Gill's constructive discharge claim is similarly unsupported by the evidence in the record. In order to prove that she was constructively discharged, Gill must show that SPC made her working conditions objectively intolerable in a deliberate attempt to force her to resign:

> The doctrine of constructive discharge protects an employee from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his coworkers. The employee is not, however, guaranteed a working environment free of stress. Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign.

(Cont'd)
employment action." *See Hopkins*, 77 F.3d at 755 (suggesting that an employee whose position was eliminated during a reduction in force but who could have continued his employment in a different position did not suffer an adverse employment action).

Carter v. Ball, 33 F.3d 450, 459 (4th Cir.1994) (citations & internal quotation marks omitted).

The record clearly establishes that Gill was unhappy with her working conditions to the point that she suffered physical symptoms requiring medical treatment. However, Gill's reaction to her working conditions is immaterial. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir.1985) (explaining that an employee's "unreasonably sensitive" reaction to the work environment does not provide proof of constructive discharge (internal quotation marks omitted)). Rather, the pertinent question is whether there is substantial evidence to support a finding that Gill's working conditions were objectively unreasonable. Gill has not satisfied this standard. First, as discussed above, Gill's transfer — which she characterizes as a demotion — does not alone prove that her working conditions were unreasonable. Gill experienced no loss of pay, grade, or benefits. And, the other incidents of which she complains, while perhaps annoying or unpleasant, are not so intolerable that a reasonable person would feel compelled to quit. Moreover, Easley's efforts to find another position for Gill after her security position was eliminated belie the notion that SPC intended to force Gill to resign. We therefore conclude that substantial evidence does not support the jury verdict for Gill on her claim that SPC retaliated against her by means of a constructive discharge. Thus, the district court erred in refusing to grant SPC's motion for judgment as a matter of law on this count.

III.

Because the evidence produced in support of Gill's claims of retaliation is not sufficient to support the verdict, we determine that the district court erred in denying SPC's motion for judgment

as a matter of law. Accordingly, we reverse. Our conclusion on this point renders consideration of SPC's other arguments on appeal unnecessary, but the award of attorneys' fees must also be vacated in light of our holding.

REVERSED